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No. 06-16

FILED

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THUMBELINA BROWN,

Petitioner,

v.

McLEOD REGIONAL MEDICAL CENTER OF THE PEE DEE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

CHARLES E. McDONALD III
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
P.O. Box 2757
Greenville, SC 29602
(864) 271-1300

KATHERINE DUDLEY HELMS
Counsel of Record
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1320 Main Street, Suite 600
Columbia, SC 29201
(803) 252-1300

Counsel for Respondent

202531

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Court should grant certiorari to review the Fourth Circuit Court of Appeals' decision affirming the decision of the United States District Court For The District Of South Carolina in Petitioner's case of alleged race discrimination, where the Petitioner failed to present evidence that raises a material question of fact to support her prima facie case of discrimination?

CORPORATE DISCLOSURE STATEMENT

Respondent, McLeod Regional Medical Center, is a private wholly owned subsidiary of McLeod Health.

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STATEMENT OF THE CASE

Petitioner filed suit in the Court of Common Pleas in Florence, South Carolina, on October 29, 2002. The Complaint included a claim for race discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. Respondent removed the case to The United States District Court For The District of South Carolina on November 25, 2002, and subsequently filed a timely Answer. McLeod filed a motion for summary judgment on April 25, 2004, that was granted by the district court on April 29, 2005, dismissing the case with prejudice. Petitioner filed a Notice of Appeal on May 22, 2005, and the Fourth Circuit Court of Appeals affirmed the decision of the district court by Order dated January 25, 2006. (copy attached).[1]

STATEMENT OF THE FACTS

McLeod is a regional healthcare system located in Florence, South Carolina. McLeod hired Brown on September 12, 1978, as a Nursing Assistant in the Obstetrics and Gynecology Units of the Hospital. After suffering an injury to her back in the mid-1980s, McLeod allowed Brown to transfer to the position of Unit Secretary in October 1988.

Brown broke her ankle on or about May 24, 2000, in an automobile accident. Following surgery to her ankle, Brown was unable to return to work and requested a leave of absence. Brown's supervisor, Hart Smith, sent her a memorandum

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1. The Orders contained in the Appendix to the Petition For Writ Of Certiorari are incomplete copies, so Respondent included a complete copy of the Fourth Circuit Court of Appeals Order for the convenience of the Court.

addressing her need for a leave of absence. Dr. Angus McBryde completed a medical certification on June 12, 2000, which stated that Brown could not return to work and would be unable to return to work for approximately three months or longer. Natalie Lynch, McLeod's Human Resources Assistant, sent Brown a letter dated July 17, 2000, in which she was informed that her request for a medical leave of absence was approved beginning May 26, 2000. Brown was further informed that her leave did not qualify for FMLA protection and that before she could return to work from her leave of absence, she would need to coordinate her return with representatives from the Human Resources Department.

Brown took medication for about one month and did physical therapy for about two months in an effort to help her recovery. However, on August 14, 2000, Dr. McBryde completed another medical certification form indicating that Brown could do no standing or walking. Brown's physical limitations included "no standing or walking," and the duration of the incapacity was indefinite. Brown returned to Dr. McBryde for a follow-up visit on November 22, 2000. Brown explained to Dr. McBryde that it was necessary for her to perform walking as part of her job. Dr. McBryde released Brown to return to work with certain physical restrictions, including: "(1) no more than ten minutes per hour on her feet, (2) no more than five minutes walking per hour (this is included in number 1), and (3) should not carry anything over three to four pounds during the minimum time on her feet." After reviewing these restrictions, McLeod determined that Brown could not perform the essential functions of the Unit Secretary position with the restrictions that had been placed on her by Dr. McBryde.

Brown saw Dr. McBryde again on March 19, 2001, and Dr. McBryde again provided Brown with a note releasing her to return to work effective April 14, 2001. Dr. McBryde's note indicted that Brown should limit standing and walking as much as possible. Upon receiving this office note from Dr. McBryde, McLeod requested more specific information regarding the amount of walking and standing that Brown could do within his restrictions. In light of McLeod's request, Dr. McBryde completed a medical certification form on April 9, 2001, stating that the physical restriction on Brown was "no standing and walking as part of the job." As a result of these restrictions, Brown was not able to return to work at McLeod at that time. Brown met with Hart Smith, her supervisor, and two benefits specialists of McLeod, Miriam Carter and Pam Erwin, in order to discuss her doctor's most recent restrictions.

Following their meeting, Carter, Smith, and Erwin were unable to determine if Brown was capable of returning to work with Dr. McBryde's restrictions. Carter contacted John Zelenka, McLeod's Work Recovery Manager, and asked him to perform a worksite evaluation to determine if Brown could perform the essential functions of the Unit Secretary position with her current restrictions. Zelenka evaluated the physical requirements of the Unit Secretary position to determine whether Brown could perform the essential functions of her job. Zelenka interviewed Smith and another Unit Secretary and personally observed a Unit Secretary performing the job duties to determine the amount of time spent walking and standing in performing the duties of the Unit Secretary. Zelenka determined that based on his review of the physical requirements of the job, Brown could not perform the functions of the Unit Secretary position while adhering to the restrictions placed on her by Dr. McBryde. Zelenka was

then asked by Carter to determine whether there were any reasonable accommodations that could be made to allow Brown to perform her job as a Unit Secretary. Zelenka contacted Dr. McBryde's office, and they suggested the use of a motorized scooter. Zelenka, however, determined that the scooter would not fit in all areas pertinent to Brown's job and would not be allowed in certain areas because of space limitations.

Under McLeod's leave of absence (non-FMLA leave) policy, employees who remain on leave for 12 months without returning to work are subject to termination. As of May 26, 2001, Brown had been on leave for 12 months and had not yet been able to return to her Unit Secretary position. However, because of McLeod's efforts to provide an accommodation to Brown, her employment was not terminated after 12 months of leave. Instead, McLeod decided to give Brown an opportunity to transfer to another position at McLeod that met her physical restrictions. This would allow her to remain employed with McLeod.

Rather than immediately terminating her employment after she exceeded the 12-month maximum leave time, McLeod provided Brown time to locate another position that would fit her medical restrictions. Carter arranged for Brown to meet with a recruiter to locate a job to which Brown could transfer that would meet her medical restrictions. Carter explained that Brown had 60 days to find another position to which she could transfer. Carter specifically explained to Brown that she would be terminated if she did not transfer to another position at McLeod within that 60-day time period. Carter contacted Brown on three separate occasions to inform her that McLeod had positions available that might meet her restrictions and that Brown needed to contact the recruiter

immediately regarding these positions. However, after her initial meeting, Brown never applied for any transfer and never made any further contact with representatives of McLeod to discuss the possibility of transferring to another position. As a result of her failure to transfer to another position at McLeod within the 60 days, Brown's employment with McLeod was terminated effective September 1, 2001.[2]

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to the call for an exercise of this Court's supervisory power;

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2. Brown had an office visit with Dr. McBryde on August 31, 2001. His notes indicate that Brown would be unable to carry out the full workload of her job duties for an indefinite period of time, but "estimated at least six months." McLeod had already provided Brown a three-month leave extension.

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important issue of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Conversely, Rule 10 expressly states that a "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Brown's petition should be denied because there are no "compelling reasons" for granting certiorari in this case. This case does *not* involve (1) a conflict among the United States courts of appeals, (2) a conflict between a United States court of appeals and a state court of last resort, (3) a conflict on an important federal question among state courts of last resort, or (4) a conflict between this Court's decisions and the decisions of lower courts. Rather, this case involves nothing more than a claim of alleged employment discrimination. Moreover, the asserted error in this case consists of nothing more than allegations of erroneous factual findings or general misapplication of the law. Those are precisely the types of allegations that Rule 10 provides are not appropriate for certiorari. Accordingly, the petition for writ of certiorari should be denied.

II. The Petition Fails On The Merits.

A. The Burden-Shifting Analysis Remains Appropriate In Employment Discrimination Cases.

The Fourth Circuit has consistently taken the position that *post-Desert Palace*,[3] the ultimate question remains whether the plaintiff in an employment discrimination case is a victim of intentional discrimination. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277 (4th Cir. 2004) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 520 U.S. 133, 153 (2000)). Petitioner argues that *post-Desert Palace*, all Title VII cases require mixed-motive analysis at the summary judgment stage of the proceedings. The Fourth Circuit Court of Appeals rejected this argument consistent with its recent decision in *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 317 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (2006).

In *Diamond*, the Court of Appeals was presented with the same legal argument and found the argument meritless. The Court of Appeals in *Diamond* affirmed the district court's order granting Colonial summary judgment on Diamond's claims of race discrimination in violation of Title VII and 42 U.S.C. § 1981. *Diamond*, 416 F.3d at 312-13. In rejecting Diamond's argument, the Court of Appeals specifically held as follows:

> Diamond argues that the *Desert Palace* holding means that all employment discrimination cases should be analyzed as mixed-motive cases and that Title VII plaintiffs can survive summary judgment

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3. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

> simply by presenting a "prima facie case." She further argues that our en banc decision in *Hill* recognized this dual effect of *Desert Palace*. These arguments are meritless.

Id. at 317-18 (footnote omitted). The *McDonnell Douglas* burden-shifting standard is still the appropriate standard in reviewing a motion for summary judgment in Title VII employment discrimination cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

> Notwithstanding our clear recognition in *Hill* of these principles and the continued vitality of the *McDonnell Douglas* framework, Diamond insists that after *Desert Palace* that framework is "no longer a tool which can be used to dismiss a Title VII case at the [s]ummary [j]udgment stage." Her argument finds no support in the text of *Desert Palace*, which does not even mention *McDonnell Douglas*. Moreover, since deciding *Desert Palace*, the Supreme Court has continued to invoke the burden-shifting framework in pretext cases. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513, 517 n.3, 518 (2003); *see also Johnson v. California*, . . . 125 S. Ct. 2410, 2418 n.7 . . . (2005). Our sister circuits have also rejected the view that *Desert Palace* nullified the *McDonnell Douglas* framework. *See, e.g., Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005); *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1018 (8th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004).

Diamond, 416 F.3d at 318-19. Brown's argument that the Court Of Appeals erred in applying the *McDonnell Douglas*

burden-shifting test in granting McLeod summary judgment is unfounded.

Additionally, the Court of Appeals correctly concluded that regardless of the method of analysis applied, summary judgment was appropriate in this case. "Regardless of whether Brown alleges that race was a motivating factor or the sole reason for McLeod's actions, McLeod is entitled to summary judgment because Brown has failed to show there is a genuine issue of material fact as to whether McLeod intentionally discriminated against her on the basis of race." (Order at 5.) Even when Plaintiff's claims are reviewed using the mixed-motive analysis, McLeod was properly granted summary judgment in this case.

B. Petitioner Failed To Demonstrate The Fourth Element Of Her Prima Facie Case.

Brown alleges that the record contains genuine issues of material fact regarding her allegations of race discrimination. "Brown (who is African American) essentially claims that white workers with restrictions as severe as or more severe than hers have been allowed to return to work with those restrictions, where she was not." (Petition For Writ at 14.) Despite her contentions, the Court of Appeals correctly concluded that Brown failed to present any evidence from which a court could conclude that a genuine issue of material fact remained for trial. Brown failed to establish the fourth element of her prima facie case.

The Court of Appeals correctly concluded that Plaintiff failed to produce evidence of similarly situated employees who were not members of the protected class who were retained. (Order at 5.) The Court of Appeals correctly

concluded that Debra Powell and Brown were not similarly situated because: (1) Powell was on FMLA leave while Brown was not, and (2) Powell was released to return to work with minor restrictions after less than one month and released without restrictions after four months, while Brown was released only with significant restrictions. Brown was never released without restrictions as Powell. (Order at 5-6.) Because Brown failed to carry her burden of establishing a prima facie case of race discrimination, McLeod was properly awarded summary judgment.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KATHERINE DUDLEY HELMS
Counsel of Record
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1320 Main Street, Suite 600
Columbia, SC 29201
(803) 252-1300

CHARLES E. MCDONALD III
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
P.O. Box 2757
Greenville, SC 29602
(864) 271-1300

Counsel for Respondent

APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JANUARY 25, 2006

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-1601

THUMBELINA BROWN,

Plaintiff-Appellant,

versus

MCLEOD REGIONAL MEDICAL CENTER OF THE PEE DEE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, District Judge. (CA-02-3973-4)

Submitted: January 3, 2006 Decided: January 25, 2006

Before MICHAEL, TRAXLER, and DUNCAN, Circuit Judges.

Appendix

PER CURIAM:

Thumbelina Brown sues her former employer, McLeod Regional Medical Center of the Pee Dee, Inc. (McLeod), for race discrimination in her employment, in violation of Title VII and section 1981. The district court granted summary judgment to McLeod, and Brown appeals. We affirm for the reasons stated below.

I.

Brown, an African-American woman, began working as a nursing assistant at the McLeod Gynecology and Obstetrics Unit in 1978. She moved to the position of unit secretary in 1998. On or around May 26, 2000, Brown broke her ankle in a car accident and underwent surgery. She requested a leave of absence after her surgery because she was unable to return to work. In response, McLeod requested that Brown's doctor complete a "Medical Certification." McLeod also provided Brown with notice of her Family and Medical Leave Act (FMLA) rights and directed her to contact the McLeod Human Resources Office about short-term disability benefits. On June 12, 2000, Dr. Angus McBryde completed Brown's medical certification, which indicated that Brown could not return to work for at least three months. On July 17 McLeod notified Brown that her request for a medical leave of absence was approved but that the leave did not qualify for FMLA protection. On August 14 Dr. McBryde completed a second medical certification, which indicated that Brown could return to work provided she was not required to stand or walk. Dr. McBryde wrote a note on November 22 indicating that Brown could return to work with three restrictions: she

spend no more than ten minutes per hour on her feet, she spend no more than five minutes per hour walking, and she refrain from kneeling, bending, or carrying anything over three to four pounds during the time on her feet. Although Brown was ready to return to work, McLeod determined that Brown could not perform the essential functions of the unit secretary position with these restrictions; thus McLeod did not let her return.

Several months later, in April 2001, Dr. McBryde completed another medical certification, which indicated that Brown could return to work with the restriction of "no standing or walking as part of the job." J.A. 311. McLeod again did not allow Brown to return to work. Soon thereafter, McLeod Work Recovery Manager John Zelenka performed a work site evaluation to determine if Brown could perform the essential functions of the unit secretary position with the restrictions Dr. McBryde placed on her. After talking to Dr. McBryde, interviewing other unit secretaries, and observing a unit secretary perform the job, Zelenka concluded that Brown could not perform the essential job functions. Zelenka also considered whether Brown could perform her job with a motorized scooter, but concluded that the scooter was not a viable solution because it would not fit in all areas pertinent to the job.

McLeod's leave of absence policy provides that employees who remain on leave for twelve months without returning to work are subject to termination. Brown's leave reached twelve months on May 26, 2001. However, McLeod extended Brown's leave so that she could look for another position at McLeod where her restrictions could be

accommodated. McLeod asserts that it made several attempts to contact Brown by phone about other job opportunities at McLeod that might meet her restrictions, but that Brown never responded. Brown does not deny this assertion. McLeod terminated Brown's employment on September 1, 2001.

Brown sued McLeod, alleging discrimination on the basis of race, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. On April 29, 2005, upon the recommendation of the magistrate judge, the district judge entered summary judgment for McLeod. Brown appeals.

II.

Brown argues that the district court erred in using the Title VII burden shifting test, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), requires mixed-motive analysis, *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in all Title VII cases at summary judgment. We recently rejected this argument in *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 317 (4th Cir. 2005). Regardless of whether Brown alleges that race was a motivating factor or the sole reason for McLeod's actions, McLeod is entitled to summary judgment because Brown has failed to show that there is a genuine issue of material fact as to whether McLeod intentionally discriminated against her on the basis of race. *See id.* at 319.

Brown argues that the district court erred in concluding that she had failed to establish a genuine issue of material

fact on the fourth element of her prima facie case for race discrimination: that other similarly situated employees who are not members of the protected class were retained. *See, Bryant v. Bell Atlantic Md., Inc.*, 288 F.3d 124, 133 (4th Cir. 2002). Specifically, Brown alleges that the court erred in finding no genuine issue of material fact as to whether Debra Powell, a white employee, was in a situation similar to Brown's. Although both employees took leaves of absence, they are not similarly situated because Powell was on FMLA leave while Brown was not. Furthermore, Powell was released to return to work with minor restrictions after less than one month and returned to work without restriction after four months. Brown, however, was released to work after three months, but only with significant restrictions. At no point was Brown released to work without restriction. We therefore conclude that the district court did not err in determining that there is no genuine issue of material fact as to whether Powell and Brown were similarly situated. Because Brown cannot establish a prima facie case of discrimination, McLeod is entitled to summary judgment.

III.

For the foregoing reasons, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED